U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16212473

DATE: MAY 27, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, a senior living facility, seeks to employ the Beneficiary as a nurse manager. It requests classification for the Beneficiary as an advanced degree professional under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner willfully misrepresented the fact of a familial relationship with the Beneficiary which was material to the Beneficiary's eligibility for the requested immigration benefit. Based on the misrepresentation finding the Director concluded that the evidence did not establish that the proffered position was a *bona fide* job opportunity available to U.S. workers.

The matter is now before us on appeal. The Petitioner asserts that there was no willful misrepresentation of a material fact with respect to the family relationship between the Petitioner and the Beneficiary, and no basis for the finding that the proffered position was not a *bona fide* job offer.

Upon *de novo* review we will withdraw the Director's decision and remand the case for further consideration and a new decision.

I. LAW

A. Schedule A Occupation

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified, and available, and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id*. Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification (ETA 9089), from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the immigrant

petition (Form I-140) is filed directly with USCIS along with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15. If USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

The DOL regulation at 20 C.F.R. § 656.5(a)(2) states that aliens who will be permanently employed as professional nurses must (1) have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); (2) hold a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

B. Willful Misrepresentation of a Material Fact

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-,* 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980).

II. ANALYSIS

The instant petition was filed on June 11, 2020, accompanied by an uncertified ETA 9089 which specified in Section H (Job Opportunity Information) the specific educational, experience, and other requirements for the proffered position of nurse manager. All requirements must be met by the petition's priority date,[1] which in this case is June 11, 2020. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

The ETA 9089 includes a compound question at Section C.9, which reads:

> Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?

The Petitioner answered "No" to this question on the ETA 9089.

[1] The "priority date" of an employment-based immigrant petition is ordinarily the date the underlying labor certification application was filed with the DOL. *See* 8 C.F.R. § 204.5(d). In this case, however, since the petition did not require a certified ETA 9089, the "priority date" is the date the petition (with the completed but uncertified ETA 9089) was filed with USCIS.

The Director issued a request for evidence (RFE) stating that "it appears that a *bona fide* job offer does not exist" and requesting documentary evidence to demonstrate otherwise. The types of evidence listed by the Director included documentation detailing any business or family ties the Petitioner's owners and officials may have with the Beneficiary. The Director also requested evidence of the Petitioner's ability to pay the proffered wage.

In response to the RFE the Petitioner submitted statements from its president and co-owner, [redacted] and from the Beneficiary, which acknowledged a close family tie between the Beneficiary and the Petitioner's co-owners, [redacted].[2] The Beneficiary is the sister of the [redacted] and thus the sister-in-law of [redacted]. The Petitioner contended that the familial relationship between its co-owners and the Beneficiary should have no bearing on the latter's eligibility for the immigration benefit requested. The Petitioner also submitted a "corrected" page 1 of the ETA 9089 with the "Yes" box checked in answer to the question at Section C.9. In addition, the Petitioner submitted documentation addressing its ability to pay the proffered wage.

The Director denied the petition on October 5, 2020, concluding that the Petitioner's answer of "No" to the question at Section C.9 of the ETA 9089, together with the declaration of the Petitioner's president in Section N of the ETA 9089 that the information contained therein was true and correct and the certification of the Petitioner's president in Part 8 of the I-140 petition that its contents were true and correct, constituted the willful misrepresentation of the familial relationship between the Petitioner's co-owners and the Beneficiary, which was material to whether the Beneficiary is eligible for the requested immigration benefit. Due to the familial relationship between the Petitioner and the Beneficiary the Director determined that the evidence failed to establish that a *bona fide* job opportunity was available to U.S. workers. The Director made no specific finding that the Beneficiary also willfully misrepresented a material fact, but did refer to the statutory provision at section 212(a)(6)(C)(i) of the Act which bars aliens who willfully misrepresent a material fact in pursuit of an immigration benefit from admission to the United States.

On appeal the Petitioner asserts that its answer of "No" to the question at Section C.9 of the ETA 9089 was a clerical error which was rectified in the response to the RFE by the statements from the Petitioner and the Beneficiary acknowledging their familial relationship, as well as email correspondence with USCIS and the submission of the "corrected" page 1 of the ETA 9089 with the appeal.[3] The Petitioner contends that checking the wrong box at Section C.9 of the ETA 9089 was an inadvertent, not willful, misrepresentation of the familial relationship, and that it was a harmless error in any event because it was not material to the Beneficiary's eligibility for the requested immigration benefit. Since professional nurses are a Schedule A occupation, the Petitioner states, no recruitment was required for the proffered position, no U.S. workers were adversely affected by the erroneous answer on the ETA 9089, and the *bona fides* of the job opportunity was not undermined by the familial relationship between the Petitioner and the Beneficiary. Because the proffered position is in a shortage occupation with no recruitment activity that the Beneficiary might influence, the Petitioner asserts that its incorrect

[2] The record shows that the Petitioner is owned 50% by [redacted] who serves as president, and 50% by his wife, [redacted] who serves as vice president.

[3] We note that a petitioner may not make material changes to a previously filed petition to make it conform to USCIS requirements for eligibility and approval. *See Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r 1998).

answer to the familial relationship question at Section C.9 of the ETA 9089 was irrelevant, and thus not material, to the question of whether a *bona fide* job opportunity is available.

We agree with the Petitioner insofar as the Director did not adequately explain how the misrepresentation (whether willful or not) at Section C.9 of the ETA 9089 was material to the question of whether the nurse manager position is a *bona fide* job opportunity. Since professional nurses are a Schedule A occupation, there was no requirement to test the U.S. labor market for the proffered position. Therefore, it was incumbent upon the Director to make clear how the familial relationship between the Petitioner and the Beneficiary was material to the question of whether the nurse manager position was a *bona fide* job opportunity available to U.S. workers.[4] The Director's decision did not do that. In sum, the Director's finding that the Petitioner willfully misrepresented a fact on the ETA 9089 that was "material" to the Beneficiary's eligibility for the requested immigration benefit is not fully explained, and the Petitioner was not given sufficient opportunity to address the issue. The same applies to the Director's determination that the proffered position is not a *bona fide* job opportunity.

Accordingly, we will remand this case for further consideration of these issues, and any other issues the Director may deem relevant, such as whether the job of nurse manager qualifies for Schedule A. At his discretion the Director may wish to request additional evidence from the Petitioner. When the record is complete the Director shall issue a new decision.

ORDER: The Director's decision of October 5, 2020, is withdrawn. The matter is remanded for further proceedings consistent with the foregoing decision and for the entry of a new decision. If the new decision is adverse, it shall be certified to us for review.

[4] The employer attested at Section N.8 of the ETA 9089 that the job opportunity has been and is clearly open to any U.S. worker, and must submit evidence thereof if the Director so requests.